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Thursday, December 22, 2005

The Justice Department vs. the United States Constitution

Two professors here at GWU, Orin Kerr and Daniel Solove have written on the legality of the President authorizing the ultra-secretive National Security Agency (NSA) to spy on U.S. citizens without getting warrants from the FISA court. For further updates check Volokh Conspiracy and Emergent Chaos.

For the President to authorize the NSA to bypass the courts and spy on citizens without a warrant is very dangerous and very illegal. We have spent most of the last century expending hundreds of thousands of lives and trillions of dollars to fight against dictatorships, and now we are accelerating down the entrance ramp to unchecked executive power ourselves.

The Justice Department argues that the President has what amounts to arbitrary powers in times of war or emergency. Here is some of what the founders of the United States wrote that flies in the face of the Justice Department's view of the law. What the founders wrote in our Constitution is, despite what the Justice Department, Bush, and Gonzales say, still the law of the land:

Article I gives Congress "all legislative power" including the right to declare war and "[t]o make rules for the government and regulation of the land and naval forces." Congress is entrusted with the basic war-making powers. It may through specific legislation instruct the executive branch, and the executive must "faithfully execute" these laws (Article II). To not faithfully execute the FISA statute that requires a court warrant for a wiretap, for example, is an impeachable offense against the Constitution. To fail to faithfully execute the Fourth Amendment, which requires a court warrant for conducting any search, is an impeachable offense against the Constitution.

"All legislative powers" means these powers are inalienable: Congress may not grant them wholesale to the executive branch. Congress could thus not in its 2001 war authorization instructing the President to use "all necessary and appropriate force" have thereby given the President powers arbitrarily to spy on United States citizens communicating overseas -- even if that is what Congress intended, which is highly doubtful. Rather, the President's powers to spy remain defined by the Congressional acts which specified FISA,including the PATRIOT Act. These acts (like the Constitution itself) require the executive branch -- that includes the NSA as well as the FBI and every other such agency -- to obtain a court warrant before spying on the communications of U.S. citizens, whether that communication is directed overseas or is purely domestic.

The very lame "process" of the President notifying a handful of House and Senate leaders about the existence of some vague wiretapping program, which cannot be further elucidated "for national security reasons," is no sort of effective check and balance and thus, not surprisingly, is not mentioned anywhere in the Constitution.

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Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

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Furthermore, the Fourth Amendment to that Constitution expressly forbids searches and seizures without a court warrant, even if the Congress and the Executive both approve.

The utter necessity of checks and balances is well illustrated by what one of the main drafters of our Constitution, James Madison, said about them in Federalist #10. Madison thought that government, the ultimate in trusted third parties, should not be based on an actual particular party: “ambition must be made to counteract ambition. The interest of the man must be connected with the rights of the place," and thus "it is necessary...to divide and arrange the several offices in such a manner as each may be a check on the other – that the private interests of every individual may be a sentinel on the public rights.”

President Reagan advised us when it came to dealing with power to "trust but verify." Madison too fought to protect the United States against dictatorship. If we are wise, we will follow the Constitution and protect ourselves from dictatorship as well. As another of our law professors, Jonathan Turley, has stated, the NSA by spying on American citizens without warrants is committing felonies, and the President by authorizing these acts is committing felonies. By law, the President ought to be impeached by the House, convicted by the Senate, and thus thrown from office. Furtheremore, those conducting these wiretaps at the NSA are felons who must under law be fired, prosecuted, and imprisoned.

But while we are "at war" (with Iraq, terrorists, drugs, and so on) a large portion of the populace, including talk radio demagogues and most of the current Republicans in Congress (with a few refreshing exceptions such as Senator Sununu) genuflect to the alpha male as if he were God and to top secret agencies as if they were God's messengers. Impeachment by a Republican House and Senate? Fat chance. Dream on.

Furthermore, impeachment and removal of Bush, would, however strongly it is compelled by the law, only address the latest symptoms, not the disease. What is really required is a rebirth of learning about the our Constitution and a reformation of the Justice Department and our attitudes towards it.

What the President and the NSA are doing is blatantly illegal in the opinion of practically every legal scholar knowledgeable about the original meaning of our Constitution, and indeed in the opinion of most legal scholars of any philosophical stripe outside of the Justice Department. Over the years the Justice Department has developed its own unique view of the world in which the executive branch "in times of emergency" (which could mean just about any time) has the arbitrary powers of a dictator. Indeed, the Justice Department has been arguing, often with success, for the doctrine that the executive has arbitrary emergency and wartime powers long before George W. Bush (and even long before George H.W. Bush).

The Justice Department has thus given lip service to "rule of law" while slowly scratching actual rule of law and the Constitution to shreds. George Bush and Alberto Gonzales are merely the latest mouthpieces of a Justice Department that has been destroying what the founders fought for in 1776 and debated and ratified in 1789 -- protection against unchecked government.

We must thus reform the Justice Department and our attitudes towards that Department. The Supreme Court should never treat Justice Department as a source of legal authority. It should impute to their briefs no more credibility than it imputes to anybody's else's brief. The Justice Department is just another party with an interest -- except that this interest happens to be aggrandizing to the executive branch arbitrary power over which the only remaining legal check is the Justice Department itself.

This is the Christmas season here in the United States, a season of the story of when God came down to Earth as the baby Jesus and angels sang about Peace on Earth. If we were ruled by God on earth, we would not need separation of powers with checks and balances. Madison wrote, "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary.” But we are not ruled by an omniscient and omni-beneficent deity, nor by angels: we are ruled by George Bush as advised by a Justice Department that has forgotten what the Constitution means. The Christmas infant when he grew up said to "render unto Caesar the things that are Caesar, and unto God the things that are God's." Our Caesar is, like the Caesars

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of old, trying to aggrandize himself with powers that could only wisely be entrusted to an all-beneficient God. We thus need separation of powers and checks and balances more than ever.

And we need the Justice Department to stop aggrandizing power to itself by misleading the President and the American people about the United States Constitution. There might be an excuse of naive reliance on bad advice to forgive the President for making the claims he is making, but professional lawyers entrusted with enforcing the federal laws should know better.

Posted by Nick Szabo at 8:49 AM

Relationship rights and the United States Supreme ...

The negative rights debate continues

► November (5)

► October (23)

3 comments:

Anonymous said...

The Fourth Amendment does not "expressly forbid[] searches and seizures without a court warrant" -- it forbids "unreasonable" search and seizure. The courts have long held that certain warrantless searches are reasonable, particularly in conjunction with the exercise of the President's Article II powers. Border searches are a clear example of warrantless searches that do not violate the Fourth Amendment.

Whether the NSA program actually violates FISA depends on technical details that we can't know about yet. Whether FISA can overrule the President's Article II powers is unclear. As is the question of whether the AUMF counts as statutory authorization for the surveillance (as the Supreme Court argued it did for the detention in Hamdi v. Rumsfeld).

This is a very grey area and the courts have typically given the Executive pretty wide lattitude in matters concerning search and seizure during the gathering of foreign intelligence.

8:54 PM

J Thomas said...

Anonymous, I find I must disagree with you, and instead agree with Nick Szabo and almost every legal scholar.

This issue is only gray if we make strenuous efforts to paint it gray. Perhaps you might return and tell us who you are, and give us some idea what your vested interests are in this matter?

5:20 AM

Nick Szabo said...

Let's look at the full language:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Compare this to the Takings Clause of the Fifth Amendment:

"... nor shall private property be taken for public use, without just compensation."

One could interpret the Fifth Amendment as saying that it's OK for the federal government to take private property for private use without compensation. Instead, the modifier "for public use" implies the government has no power to take for private use whether just compensation is given or not. Similarly, "...no warrant shall issue except..." implies that no searches, reasonable or otherwise, may be conducted without a warrant.

The requirement of a warrant is there to insure that an independent entity can check to make sure the search is "reasonable." The language "particularly describing the place to be searched, and the persons or things to be seized" forces the searching party to articulate their reasons for the search and allows the independent party to review those reasons. That is how rational human beings determine whether searches are "reasonable."

Like many other laws that protect human rights, there is a procedural component and a substantive component to the Fourth Amendment, both of which must be satisfied. Take away either the procedural or the substantive requirement and you take away a crucial freedom.

That the above interpretations of the Search Clause and the Takings Clause are proper interpretations is reinforced by the main canon of construction for the Constitution, the Ninth Amendment:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Customs searches are quite distinguishable from the federal government secretly spying on international phone calls to or from the United States because (1) customs searches at ports of entry are an ancient police power, which long predates the United States and which was never abolished by the United States as a violation of the Fourth Amendment, (2) the person to be searched has notice, and (3) customs searches are not conducted in secret, so the person searched has a chance to inform the public about them and to obtain legal redress for an unreasonable search.

Without such procedural protections the Fourth Amendment would be a sham. For example, if the NSA is actually also spying on domestic-domestic calls without a warrant, which I hope even anonymous would agree would be blatantly unconstitutional, there would be no opportunity for the victim to obtain redress in court. The procedural requirement, the warrant, is necessary to give substance to the substantive requirement, that searches be reasonable. Otherwise the Fourth Amendment is just a cruel joke.

7:52 AM

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